

**Sullivan v Board of Educ. of the City Sch. Dist. of the
City of N.Y.**

2023 NY Slip Op 31669(U)

May 17, 2023

Supreme Court, New York County

Docket Number: Index No. 160947/2022

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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KIERA SULLIVAN

Petitioner,

- v -

THE BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,

Respondent.

-----X

INDEX NO. 160947/2022

MOTION DATE N/A

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Petitioner’s motion to vacate this Court’s decision is denied.

Previously, this Court dismissed the instant petition (in which petitioner seeks to annul a denial of her request for a religious accommodation from the COVID-19 vaccine) on the ground that petitioner signed a release (NYSCEF Doc. No. 36). The Court observed that petitioner did not offer any substantive arguments in response to the release issue.

Petitioner now moves to vacate and claims that respondent was prohibited from making a pre-answer motion to dismiss. She argues that she did not think it necessary to offer a response to an improper motion. Her attorney claims it was simply law office failure.

Petitioner argues that the arbitration award (that provided for the COVID-19 vaccination process and related exemption requests) only applied to the 2021-2022 school year and it cannot be applied, as respondent attempts, to the 2022-2023 school year. She claims she was entitled to ask for a religious accommodation and that the waiver produced by respondent is unsigned.

Petitioner argues that, in any event, the waiver was good through November 30, 2021 and so it should have no bearing on this proceeding.

In opposition, respondent argues that the waiver was the product of a negotiation between the Department of Education and petitioner's union and provided that a union member could choose to not submit proof of vaccination in exchange for receiving certain benefits. But that agreement provided that the union member would be deemed to have voluntarily resigned on September 6, 2022 if he or she chose this option. Respondent also argues that the waiver was signed via electronic means.

Petitioner submitted a reply¹, in which she characterizes the release as an "unsigned waiver" and that respondent "make[s] things up to fit their agenda" (NYSCEF Doc. No. 50). Petitioner adds that respondent unilaterally adjourned the return date of the petition and the Court should reject that effort.

Discussion

As an initial matter, petitioner's claim of law office failure satisfies her burden to vacate the previous order. However, the Court must also consider whether petitioner has a meritorious opposition to respondent's cross-motion to dismiss.

The waiver at issue provides that "I understand that if I have not returned by September 6, 2022, I shall be deemed to have voluntarily resigned" (NYSCEF Doc. No. 31).

The waiver also stated that:

"In exchange for the right to return and extended health benefits as set forth herein, I agree to waive and release the DOE and any of its present or former employees or agents (collectively the "Released Parties"), from any and all claims, liabilities, or causes of action which were or could have been asserted by me against any of the Released Parties based upon anything that has happened up to now and including the date of the execution of this Attestation, including, but not limited to, any right

¹ Although the order to show cause did not permit the filing of a reply, the Court will consider it.

or claim that may exist or arise up to and including the date that this Attestation is signed” (NYSCEF Doc. No. 31).

The Court observes that although petitioner characterizes this waiver as “unsigned” the waiver submitted contains petitioner’s name and purports to contain an electronic signature at the end. Therefore, the Court finds that respondent met its burden to show that petitioner signed the waiver. And petitioner did not raise an issue of fact as to whether she signed this agreement because she did not submit an affidavit asserting that she never signed the agreement and received the benefits. Submitting an attorney’s affirmation is not sufficient to raise a legitimate question about whether petitioner signed this release and therefore vacate the Court’s previous order.

Moreover, the waiver unambiguously provides that if petitioner agreed to accept certain benefits she would be deemed to have voluntarily resigned by September 6, 2022 unless she submitted proof that she received the vaccination. Petitioner did not raise any sufficient arguments as to how she can avoid the clear terms of this bargain.

Summary

Petitioner was provided a choice—if she chose to continue receiving health benefits, she agreed to release respondent and that she had until September 6, 2022 to get vaccinated. That renders petitioner’s claims about seeking a religious accommodation for the 2022-2023 school year as moot. She was deemed to have voluntarily resigned as of September 6, 2022. Respondent attaches emails sent to petitioner reminding her of the various deadlines and the consequence for not providing proof of vaccination (NYSCEF Doc. No. 46).

The Court recognizes that petitioner has made numerous procedural arguments in this proceeding. This Court prefers to decide cases on the merits. Although respondent should have

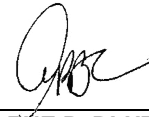
made its cross-motion to dismiss returnable earlier (and picked the same return date as the petition), the fact is that petitioner was afforded an opportunity to respond to this cross-motion both in connection with that application and here, in this motion. And the Court finds that the waiver prohibited her from bringing this petition.

Accordingly, it is hereby

ORDERED that petitioner’s motion to vacate is denied.

5/17/2023

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE